JAN 9 1981

No. 80-5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,

Appellant,

vs.

PATRICIA ANN McCARTY,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIRST APPELLATE DISTRICT

Motion of the National Organization for Women Legal Defense and Education Fund (NOW LDEF), National Center on Women and Family Law, Women's Legal Defense Fund, Older Women's League, Action for Former Military Wives, California Women Lawyers, Women Lawyers' Association of Los Angeles, Queen's Bench of San Francisco, Women Lawyers of Northern Santa Barbara County (Ca.) for Leave to File Brief as **Amici Curiae,** and **Amici Curiae** Brief in Support of Appellee Patricia Ann McCarty.

* * *

Gertrude D. Chern, Counsel, Chern, Brenneman & Garcia, P.O. Box 667, Santa Maria, Ca. 93456, Telephone: 805-922-4553;

and

Judith I. Avner, NOW LDEF, 132 W. 43d St., New York, N.Y. 10036 212-354-1225

Isabel Marcus, 3304 Bridle Path, Austin, Tex. 78703, 512-476-3219.

Soma F. Baldwin, 301 J.E. Cook St., Santa Maria, Ca. 93454, 805-922-6155.

* * *

Gill Deford and Neal Dudovitz, National Senior Citizens' Law Center, 1636 W. 8th St., Los Angeles, Ca. 90017, Telephone: 213-388-1381.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned, counsel of record for Amici Curiae listed below, certifies that the following listed organizations have an interest in the outcome of this case. These representations are made to enable justices of the Court to evaluate possible disqualifications or recusal.

National Organization for Women, Legal Defense and Education Fund ("NOW LDEF"), 132 West 43rd Street, New York, New York 10036,

National Center on Women and Family Life,

Women's Legal Defense Fund,

Older Women's League

Action for Former Military Wives,

California Women Lawyers, c/o Marjorie Holmes, Assoc. Dean, Golden Gate School of Law, 536 Mission St., San Francisco

Women Lawyers' Association of Los Angeles, c/o Evelyn Hutt, Amicus Curiae committee chairman, Beardsley, Hufstedler & Kemble, 611 West 6th Street, Suite 2220, Los Angeles, Ca. 90017

Queen's Bench of San Francisco, c/o Kathy S. Krohn, 1419 Broadway, Oakland, Ca. 94612

Women Lawyers of Northern Santa Barbara County, c/o Soma F. Baldwin, 301J E. Cook Street., Santa Maria, Ca. 93454.

by _____

Gerturde D. Chern, Santa Maria, Ca.

Judith Avner

Isabel Marcus

Soma F. Baldwin

Attorneys for Amici Curiae

also: Gill Deford and Neal S. Dudovitz
National Senior Citizens Law Center, 1636 W. 8th St., Los Angeles, Ca. 90017

QUESTIONS PRESENTED

Amici Curiae respectfully suggest that the Question Presented, in the light of the actual Case before this Court (Art. III, U.S. Constitution) is this:

HAS CONGRESS EXPRESSLY PRECLUDED THE STATES FROM DEFINING MILITARY RETIRED PAY AS "MARITAL PROPERTY" as between HUSBAND AND WIFE, FOR PURPOSES OF MARITAL DISSOLUTION ACTIONS IN STATE COURTS; CONVERSELY, HAS CONGRESS EXPRESSLY DEFINED MILITARY RETIRED PAY AS "SEPARATE PROPERTY" IN A MANNER DIRECTLY CONFLICTING WITH STATE STATUTES?

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MOTION

The National Organization for Women Legal Defense and Education Fund ("NOW LDEF"), National Center on Women and Family Law, Women's Legal Defense Fund, Older Women's League, Action for Former Military Wives; California Women Lawyers, Women Lawyers' Association of Los Angeles, Queen's Bench of San Francisco, Women Lawyers of Northern Santa Barbara County (Ca.) respectfully move this Court for leave to file the accompanying brief in this case as **amici curiae**, on behalf of appellee Patricia Ann McCarty. They

concur, and incorporate by reference the **amicus curiae** brief filed by Jeffery Gershman, Esq., Covington & Burling, Washington, D.C., on behalf of various other **amici curiae** including the honorable Patricia Schroeder, Member of Congress.

The consent of the attorney for appellee herein has been obtained by NOW LDEF, but the attorney for appellant herein has refused to consent to the filing of a brief by the organizations and associations listed as the moving parties in this motion.

Applicants are concerned with prevention of damage to the concept that marriage is a partnership to which each spouse contributes by his or her industry, and that each possesses "an equal (or equitable) right to succeed to the property after dissolution . . ." Hisquierdo v. Hisquierdo, 439 U.S. at 577-8, commenting on community property law. Since Hisquierdo was briefed these concepts have spread throughout the land. Amici are therefore deeply concerned over the threat posed by appellant to that growing trend toward fair treatment of marital property, in new state laws and decisions.

Amici are particularly concerned with the threat of forfeiture of the wives' share of the only income-producing asset normally accumulated by military families: the retirement income. They are peculiarly aware of the potential poverty of military wives if they are thrust into an adverse job market in middle-to-later life with the lack of training in marketable skills which is characteristic of military officers' wives and without the retirement income which was part of the "deal" relied upon in any career-military-related life.

Amici are especially concerned that any denigration of the status of state marital law by pre-emption or otherwise, will have a disproportionately adverse effect upon women, now that the states have modernized their statutes, and eliminated most of the archaic disabilities formerly placed on married women generally. They also fear the cost and difficulties of litigating "support" if state property rights in retirements are confisticated.

Amici's attorneys who are from areas with large military installations (e.g., the Vandenberg Air Force Base area of California; also Texas) are also concerned over the potential unfairness to those many military ex-husbands who have treated their wives fairly by dividing the Retirement income without a battle. They are also aware that at bases such as Vandenberg, military personnel, federal civil servants, and employees of defense contractors work side by side on many projects, such as preparation for the Space Shuttle — yet they would each be treated differently in the state divorce court, should the decision below not be sustained.

Amici believes that their position will promote further harmony in military families and thus aid, not hinder, the morale of the persons on whom the defense of this country depends. They therefore respectfully request that the court allow the brief of these **Amici Curiae** to be filed.

Gertrude D. Chern,
P.O. Box 667, Santa Maria, Ca. 93456
Telephone: 805-922-4553;
Judith I. Avner, New York.
Isabel Marcus, Austin, Texas.
Soma F. Baldwin, Santa Maria, Ca.

Gill Deford and Neal S. Dudovitz
National Senior Citizens' Law Center,
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Members of the Bar
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STATEMENT OF THE CASE

Amici will reply upon counsel for the parties to present to this court an accurate general statement of the case, but will respectfully call to the court's attention the facts in the record specially pertinent to the points raised in amici's brief.

Richard and Patricia McCarty married while Richard was in his second year of medical school in Oregon (J.A. 32). Patricia was employed while husband studied medicine (J.A. 36, 41) but has not been employed outside the home since 1958. (J.A. 36, 41).

During their marriage and during military service, which Richard entered in his fourth year of medical school, the McCarty's lived in Oregon, Pennsylvania, Texas, Hawaii, District of Columbia, and in California on two different tours of duty. (J.A. 32). They had four children. (J.A. 2, 6, 7, 40).

Richard, a Colonel, and medical doctor, at age 42 (J.A. 40) ("Dr. McCarty" hereinafter) retired from active Army service September 30, 1978, and at his last post was Chief of Cardiology at Lettermen Hospital. He was licensed to praactice medicine in California. (J.A. 32, 41).

At the time Dr. McCarty filed his petition for dissolution of their 19-1/2 year marriage (J.A. 40), Patricia was 40 years old, was studying psychology at San Francisco State, needed 5 or 6 more years of schooling to obtain employment in her chosen field. (J.A. 41).

Dr. McCarty's petition listed all property acquired during the marriage by the efforts of the parties as his "Separate property." J.A. 2, 24); his theory at the trial court level is evidently based on alleged Oregon residence as governing the designation of property as between husband and wife. (J.A. 2, 45, Conclusion of Law #7, Juris.Stmt. 34, 48, 52).

From the court of appeal opinion, it would appear that federal preeemption of the Retirement was first raised at the appellate level. (Juris.Stmt. 57) (No finding of fact or conclusions of law are in the trial court record relevant to federal preeemption).

There were no income-producing assets of the marital partners other than the military retirement income rights. (See financial statements, J.A. 19, 20, 23, 24.).

QUESTION PRESENTED

Has Congress expressly defined military retired pay as the 'separate property' of the serviceman, as between himself and his wife, in connection with divorce actions —and in a manner contrary to state law?

SUMMARY OF ARGUMENT

Almost every state legislature has overhauled its domestic relations law, mandating equitable division of "marital property" in "divorce" cases. More and more courts are dividing military, federal civil service, and other retired pay in accordance with state definition and principles.

Priority of state law in the area of domestic relations, including dissolution of marriage and division of property accumulated by the parties during the marriage, has alwasys been a guiding rule of federal-state comity, absent express Congressional or Constitutional barriers.

Neither federal law nor prior decision of this Court preclude the states from applying their marital property laws, by equitable treatment of military retired pay, based on marital service, upon the dissolution of a marriage. **Hisquierdo v. Hisquierdo,** 439 U.S. 572, (1979) is limited by the unique statutory provisions and circumstances of the Railroad Retirement law. It does not apply to the retirement income of the McCarty's, based on 18-1/2 years of marital-military service.

State statutes and case law have grown to such magnitude in the field of retirement-income-division, that an adverse decision herein would inundate the states' family law courts, and would require the legislature to revise, once more, their interrelated systems of marital property and support. In Cali-

fornia, the definition and distribution of military retired pay as "community property", when based on service during marriage, is the product of a complex legislative system evolved over a century, and of case law interpretations of some forty years. The decisions fulfill the reasonable expectation of each marital partner: to share the assets accumulated during the marriage.

Military wives must contribute substantially to their husband's service careers; they are almost never free to pursue separate careers of their own. They will be severely disadvantaged if they are forced to forfeit to their husbands their share of the military retired pay on which they have relied, and which they have help to earn. Alimony, spousal support, welfare are not acceptable substitutes for property rights for most military wives; employment income will rarely be sufficient. If the wife's share of the military retired pay is forfeited to her husband, the divorce military wife will be unjustly deprived of income earned during decades of joint effort toward the family's economic future. Her prospects are then of repeated support litigation, even potential poverty.

Nothing in the federal scheme of providing retirement income for career military personnel requires such an adverse result. Military families secure in their planning for their economic future by the government's promise of retirement income, will remain secure and their morale strengthened by a decision sustaining the state court herein.

ARGUMENT I

APPELLANT'S CONTENTIONS CONFLICT DI-RECTLY WITH THE HIGHLY PURPOSEFUL STATE FAMILY LAW SYSTEMS

A. The California law he seeks to Abrogate is the Product of Over a Century of Complex Legislation, and is Based in Part on a Treaty Which is Entitled to Supremacy Protection.

Dr. McCarty demands from the California court, a "separate property" designation of military retirement income (J.A. 24) derived primarily from the years of service during his marriage to Mrs. McCarty — a definition directly contrary to the community property statutory system in California, where all property gained by effort during the marriage is "community".

The "separate property" definition he seeks, without which the court cannot set aside the entire retirement to him, has been expressly defined by the State Constitution and by statute, and interpreted repeatedly in numerous court decisions. The rights of the Wife which he seeks to have forfeited are property rights established by law far more ancient[1] than the federal statutes from which he draws his strained inferences of applicability to his divorce action.

California Civil Code §4800 ("CC" sometimes hereinafter) mandates equal division of community property.

Where the marital partners have been previously domiciled elsewhere (together) and have property which would have been community if acquired in California domiciliaries, it is "quasi-community property" under California law, and treated identically with "community". CC §4803. ". . . 'separate property' does not include quasi-community property." CC §4804. The common law states' definition of marital property — including the recent enactments —apparently have no definition whereby property acquired in other states is excepted from the property before the court at the time of the marital dissolution. In any event, most of the states of prior residence of the parties, as

listed in the Court of Appeal opinion, (Juris.Stmt. p. 54) now have, or in the case of Texas, have always had similar statutes.[2]

All property, support, and child-related rights between the parties in a marital dissolution action are governed by the California Family Law Act, 1969, Ch.1608, CC §4000-5174, under which Act Dr. McCarty brought his suit, and the Judicial Council rules concerning same, which include the "pleading" in the Joint Appendix. See Cal. Rules of Court, 1201-1295.30; financial statement, for example, at J.A. 17-28 is based on Cal. Rule of Court Form 1285.50; e.g., J.A. 20, "spearate property" where Dr. McCarty lists **inter alia,** as 'his' all the household furniture, and alleges: "there is no property subject to disposition by the court as community property".

Dr. McCarty asks this court to upset California's (and other states') "ingenious, complex, and highly purposeful distrbution of property rights between husband and wife . . ." **U.S. v Yazell,** 382 U.S. 341, 352 (1966).

Reservation of this area of law to the states, absent a direct contrary enactment by Congress was reaffirmed in 1979: **Hisquierdo, supra,** 439 U.S. at 581.

"Separate property" is "property owned before marriage or acquired during marriage by gift, will or inheritance". Cal. Constitution, Art.1, §8, 1974 Amendment; and is similarly defined in CC §§5107, 5108 (1969) — each carrying forward definitions from an earlier date. All other property is community, with minor irrelevant exceptions; presumption is in favor of "community", CC §5110. Third persons examining California property interests for commercial or other purposes, will find "community property" defined in the property section of the Civil Code, as "property acquired by husband and wife, or either, during the marriage, where not acquired as the property of either." CC§687, (1872). There have been no relevant changes in the definition of "community" or "separate property" between 1850 and 1980, in either the Constitution or the statutes; except that during World War II, a special section giving federal priority to title designations on U.S. Savings

Bonds, upon death of a party, was added. CC §704 (1943).

The military retirement income at issue was based on 18-1/2 years of marital service (J.A. 33); it was not acquired by "gift, will or inheritance". It cannot be "separate property" by definition.

Potential forfeiture-for-fault has been the former law. Marital "fault" was eliminated in the Family Law Act of 1969,[3] which also then mandated equal division of the community property. CC §4800. The only exceptions to equal division of community property (or quasi-) in the new Codes are for personal injury damages (with special protection to the community, however, for commingled funds, and for community contributions); CC §4800(c), CC §5126, for deliberate misappropriation of community funds, CC §4800(c)(2); for missing persons where the estate is under $5,000, §4800(b)(3); debts for education, §4800(b)(4).

The 1969 Act retained protections regarding retirement payments. CC §5106 (1969), ch. 1608, §8, 1976 Ch. 1164, §1.

Legislative enactments furthering distribution of court-divided retirement monies, have occurred in the face of a State Supreme Court decision adverse to the state's own financial interests: **Phillipson v. Board of Administration, Public Employees' Retirement System,** 3 Cal. 3d, 473 P. 2d 76, 89 Cal.Rptr. 61 (1970), wherein the Attorney General unsuccessfully opposed the wife's sharing in husband's State Retirement.

Congress has not responded to the many military retirement income distributions by the marital courts of Caliofornia and other states. See, e.g., **In re Marriage of Fithian,** 10 Cal. 3d 592, 599, 517 P.2d 449, 453 111 Cal.Rptr. 369 (1974). Counsel cannot locate any subsequent Congressional response adverse to **Fithian** and the many cases throughout the country which rely on **Fithian.** Congress has, conversely, specifically aided the enforcement of marital court decisions for support.. See **infra** at 20. It is presumed that the legislative body is acquainted with and has in mind, judicial construction of existing statutes. 73 Am.Jur.2d §164.

When Dr. McCarty chose to file his suit in California, and sought to benefit from its sexually neutral custody statute, CC §4600 (APP. Br. at 7), he bound himself by its entire Family Law Act. Further, he had had the sole power as between himself and Mrs. McCarty, to choose the place and mode of living, when they last moved to California, under then-existing Civil Code §5101, since repealed as of January 1, 1975. During their earlier tour of duty in California, if the wife did not conform to husband's choice of place and mode of living, "it [was] desertion". former CC §103. (Bender's Standard California Codes, 1968, Sgl. Vol.)

B **Appellant seeks to overturn established California Case Law.**

When Dr. McCarty filed in California, the decision of its highest court had been consistently contrary to his "separate property" contention: In re Marriage of Fithian, (1974) 10 Cal.3d 592, 517 P.2d 592, 111 Cal.Rptr. 369, cert.den. 419 U.S. 825, reh.den. 419 U.S. 1060; **French v. French,** (1941) 17 Cal.2d 775, 112 P.2d 235, 237, stated that only the "unvested" nature of the military retirement kept the court from treating the property as subject to division: **In re Marriage of Brown,** (1976) 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633, overrruled **French's** "unvested" limitation. In 1975, the Supreme Court of California held that omission of a military retirement in martial dissolution was attorney-malpractice, **Smith v. Lewis,** 13 Cal.3d 349, 530 P.2d 589, 596, 118 Cal.Rptr. 621 (1975) ruling that the community character of military retirement income had long been a matter of serious consideration in California.

Military retirement rights as divided by the California courts, have become well-established California property rights from **French** until the present day. The State's high court has affirmed in **In re Marriage of Milhan(I),** 13 Cal.3d 129, 528 P.2d 1145, 117 Cal.Rptr. 809, (1974) cert.den. 421 U.S. 976 (1975); **In re Marriage of Milhan(II)** (same Commander Milhan), 27 Cal.3d 765, 613 P.2d 812, 166 Cal.Rptr. 533,(1980)

cert.applied for again by Commander Milhan; **In re marriage of Stenquist,** 21 Cal.3d 779, 582 P.2d 96, 148 Cal.Rptr. 9 (1978); **Henn v. Henn,** 26 Cal.3d 323, 605 P.2d 10, 161 Cal.Rptr. 502 (1980) — "missed pension" still joint property. The court of appeal cases in California are too numerous to list in this brief; their results have long been final."[4]

C. **The Statutory Schemes of Almost all States now Define all Rights Acquired by Marital efforts as Marital Property, and by Statute and Case Law the Marital Property is Divided Equitably.**

1. Under Current State Statutes, the Retirement Herein Is Marital Property. It Cannot Be "Husband's Separate Property" and Wife Must Share.

Most non-community-property states have completly revised their statutory schemes regarding marriage and divorce, and property and support as between husband and wife. They have adopted definitions of marital property and "separate property" almost identical to California's, and, have adopted a rule of equitable distribution between the spouses of marital property.

New York (1980), Pennsylvania (1980), Iowa (1979), Minnesota, (1978), Illinois (1977) are examples. They all support Wife's position herein: that all "gains" during the marital period, including military retirement income, if based on marital-years-service, is marital property, and cannot be "separate" by definition. Only a handful of states are now contrary; all recent legislative enactments have been in the direction of greater fairness to the economically weaker partner, and reflect modern economic realities.[5] (No quasi-marital-property exceptions could be located.)

The only remaining states which do not appear to have modernized are Alabama, Georgia, Mississippi, North Carolina, Ohio, Virginia, and West Virginia — as of mid-1980; and some experts believe that among these states, greater equity is coming into marital court decisions, Freed & Jonas,[5] Tables IV A, B, C, D, 6 FLR 4050-4052.

2. Specific Statutory Schemes of Certain Major States Illustrate the Growing Trend in Favor of Wife's Position Herein.

Minnesota defines as "marital property", "vested pension benefits or rights acquired by the parties or either of them at any time during the existence of [their] marital relations . . ." Stats. 518.54 Subdiv. 5. (1978) Pennsylvania gives special weight to marital property treatment of military retirements by providing that certain special exempt Veteran's benefits are not "separate property" if obtained by waiver of a portion of otherwise marital-period retirement pay. Wests 1980 Penn. Acts 26, Ch. 4, §401.

New York's new statutory scheme mandates "equitable division", defining marital and separate property comparably to California.[6] Illinois Rev.Stat. 1977, Ch. 40 is similar, and Military retirement has been specifically defined as marital property and divided, in **In Re Marriage of Musser,** 70 Ill. App. 743, 388 N.E. 2d 1289, 1290 (1979); the decision holds **Hisquierdo, supra,** as inapplicable, **sua sponte.**

Under Iowa's new statutes distributing property rights as may be "justified" (§598, 1979), its Supreme Court sustained a small lump sum award to Wife representing her share in Husband's military retirement. **Schissel v Schissel,** 292 N.W. 2d 421 (1980), holding **Hisquierdo, supra,** inapplicable to military retired pay.

In the federal principality of the Canal Zone, where the statute provides for division of marital property in "just proportions" (Can. Z. Tit. 8, §239 (a), military retirement income was treated as marital property. **Bodenhorn v. Bodenhorn,** 567 F.2d 629 (5th cir. 1978).

ARGUMENT
II

EQUITABLE DISTRIBUTION OF RETIREMENT INCOME RIGHTS BASED ON MARITAL SERVICE IS SUPPORTED BY THE OVERWHELMING MAJORITY OF STATE COURTS—INCLUDING MILITARY WHERE THE ISSUE HAS BEEN PRESENTED.

A. Military retirement divisions are becoming the general rule.

Military retirement income between spouses in divorces, have been divided either "equally" or "equitably" or "justly" in Arizona, California, Idaho, Illinois, Iowa, Lousiana, Michigan, Missouri, Montana, New Jersey, New Mexico, Texas, Washington, and the Canal Zone.

The leading California cases are at page 8, 9 **supra.**

Texas statutory law permits no award of permanent alimony (Tex. Family Code Ann. §3.75 (1975), VIII, Martindale-Hubbell, 1981 at 2518). Its courts have consistly treated military retirement income rights as community property in cases dating back to the last century. Texas Supreme Court cases include: **Taggart v. Taggart,** 522 S.W.2d 422 (1977); **Cearly v. Cearly,** 544 S.W.2d 661 (1976); **Busby v. Busby,** 457 S.W.2d (1970).

Federal preemption based on analyses similar to Dr. McCarty's herein was rejected, and military retirements divided by Texas Court of Appeal in **Mora v. Mora,** 429 S.W.2d 660 (1968); **Ables v. Ables,** 540 S.W.2d 769 (1976); and **Dominey v. Dominey,** 481 S.W.2d 473 (1972), cert.den. 409 U.S. 1028. Community property treatment of grants for service to the Republic of Texas was allowed in **Kircher v. Murray,** 60 F. 48,

52 (1894) and **Barrett v. Spence,** 28 Tex.Civ.App. 344, 67 S.W. 921 (1902). There are many additional Texas court of appeal cases, dealing with many variations of the basic principle, a few of which are in footnote 7, **infra.** None of the cases hold contrary to Wife's position herein. The cases cited by Dr. McCarty in the Jurisdictional Statement at page 30 do not involve standard military retired pay.

Non-community-property state courts have ruled that military retired pay based on marital-years is "marital property". Illinois: **Musser v. Musser,** 388 N.E.2d 1289 (Ill.Ct.App. 1979); Iowa: **Schissel v. Schissel,** 292 N.W. 2d 421 (Sup.Ct.1980;) Michigan: **Chisnell v. Chisnell,** 82 Mich.App. 699, 267 N.W 2d 155 (1978) cert.den. 442 U.S. 940, (1979), New Jersey: **Kruger v. Kruger,** 139 N.J. Sup.Ct. 413, 354 A.2d 340; aff'd N.J. Supreme Court 375 A.2d 659 (1977); **Hipsley v. Hipsley,** 390 A.2d 1220 (N.J. Super. July 1978); distributes military retirement, denies distribution of Railroad Retirement **pre-Hisquierdo;** emphasizes that military retired pay is subject to income taxation, unlike Railroad Retirement. New Mexico ruled that Tennessee law mandated marital property treatment of a military retirement in **Stephens v. Stephens,** 595 P.2d 1196 (Sup.Ct. 1979).

State court judgments dividing military retired pay have been held entitled to full faith and credit (obviously in the face of vigorous attack), whenever ruled upon by appellate courts: Florida — **Williams v. Williams,** 338 So. 2d 869 (Fla.App., 1976); North Carolina — **Brown v. Brown,** 204 S.E. 2d 534, 537 (App. 1974); Oregon — **Schroeder v. Schoeder,** 533 P.2d 350, 352 (Sup.Ct. 1975).

Other community property states have also ruled that military retired pay is marital property: Idaho — **Ramsey v. Ramsey,** 535 P.2d 53, 56, 96 Ida. 672 (Sup.Ct. 1975), specifically finding an absence of Congressional intent to override state law, and holding that retired pay is based on past services. (Mrs. Ramsey, however, was awarded a judgment for a lump sum, instead of the usual monthly income-as-it-comes arrangement, and Husband

therein wiped out the judgment in the bankruptcy court, **Ramsey v. Ramsey,** 9th Cir. 612 F.2d 1220). Other community property divisions of military retired pay are: Louisiana —**Moon v. Moon,** 345 So.2d 168, 175-176 (Ct.App 1977), rejecting federal supremacy. New Mexico — **Stephens v. Stephens,** 595 P.2d 1196 (Sup.Ct. 1979); **Leclert v. Leclert, 453 P.2d 755 (Sup.Ct. 1969).** Washington —**Wilder v. Wilder,** 534 P.2d 1355 (Sup.Ct. 1975); **Morris v. Morris,** 419 P.2d 129 (Sup. Ct. 1966).

B. **The Viability of Adverse Decisions is Doubtful due to Statutory Changes.**

Because so many states have recently rewritten their marital law codes, the continuing effect of past decisions adverse to military retired pay division is doubtful. Arkansas rejected a military retired pay division in **Fenney v. Fenney,** 537 S.W.2d 367 (Sup.Ct. 1976); but its revised statute in 1979 requires equal division unless "unjust", as to all marital property. Oklahoma denied a lump sum award reflecting the community interest in the military retired pay, in **Baker v. Baker,** 546 P.2d 1325 (Sup.Ct. 1975), but its present statute requires "reasonable division" regardless of title, VIII Martindale-Hubbell, 1981, at 2096, 2104. Colorado denied division of military retired pay in **In Re Ellis,** 538 P.2d 1347 (Ct.App 1975), on the grounds that Colorado is not a community property state, but has since divided a State Employee's Retirement, **In Re Marriage of Camarata,** 602 P.2d 907 (Ct.App. 1979). Nebraska's Supreme Court denied division of military retired pay, because it was the source of the alimony awarded, in **Howard v. Howard,** 242 N.W. 2d 884, (1976.)

Alaska denied divisibility of marital property recognition of military pay in **Cose v. Cose,** 592 P.2d 1230, cert.pet. docketed 79-1499; primary basis of ruling was **Hisquierdo, supra,** and came down shortly afterward.

Alaska has awarded Wife an income based on vested federal civil service retirement, where Husband hadn't yet retired, **Malone v. Malone,** 587 P.2d 1167 (Alaska Sup.Ct. 1978).

The federal circuit court has upheld marital division of military retirement income for federal tax purposes, against the tax interests of the United States, in **C.I.R. v. Wilkerson,** 368 F. 2d 552 - a non-divorce case.

Indiana, Oregon and Wisconsin have divided other federally connected retirements, but have not ruled on military retired pay.[8]

Florida in **Bradley v. Bradley,** 385 So. 2d 101 (Fla. App. 1980) awarded permanent additional alimony, with fixed minimum amount - clearly a partial "division" of military retired pay.

C. **Former Common Law States are Starting to Divide Retirements as the Case Arises.**

Non-federal retirements were distributed equitably in Delaware Hawii, Kentucky, Minnesota, and Tennessee.[9]

Other former common law states whose appellate courts have rendered decisions dividing retirement rights or establishing general principles indicating inevitable divisibility treatment of retirements: Nebraska: **Torrey v. Torrey,** 206 Neb. 485, 293 N.W.2d 402 (1980) — holds that "title" is irrelevant; Kansas: **Smith v. Smith,** 612 P.2d 1257 (1980) — divides equitably all property of parties, regardless of when acquired. Indiana: **Irwin v. Irwin,** 406 N.E.2d 317 (Ind.App. 1980) — gives consideration to future retirement in calculating property division; Kentucky: **Foster v. Foster,** 589 S.W.2d 223 (Ky.App. 1979) — non-contributory retirement plan is marital property in divorce division.

The weight of authority shown by this section is such that voluminous state legislative and court problems would arise, were the decision herein now reversed. The legislatures and Congress are presumed to be acquainted with court decisions — particularly when as numerous as has been shown in this section of the brief. 73 Am.Jur. 2d §164, Statutory Construction. Congress' inaction, combined with the positive action of the legislatures in the direction of defining retirements as marital property, and equitable distributions of such property, demonstrates that Congress has not intended to interfere with these state trends.

ARGUMENT
III

THE FEDERAL GOVERNMENT HAS CONSISTENTLY GIVEN GREAT WEIGHT TO STATES' INTERESTS IN THE MARITAL PROPERTY RIGHTS OF THEIR CITIZENS. THE FEW EXCEPTIONS DO NOT APPLY HERE.

A. **The long established Federal Policy is to Leave Marital Law to the States.**

> ". . . [T]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not the laws of the United States," said this Court in rejecting a foreign diplomat's attempt to litigate his divorce in federal court. **Ohio Ex Rel. Popovici v. Alger,** 280 U.S. 379 (1930), **Hisquierdo, supra** at 581.

Only when Congress has "positively required by direct enactment" that state [family] law be preempted, will state law be overridden. **Hisquierdo, supra,** 439 U.S. at 581. As this court said in a commercial - lien priority context (hence not subject to potential relitigation between the same parties throughout the duration of their lives):

> "Because the ultimate consequences of altering settled . . . practices are so difficult to foresee, we hesitate to create new uncertainties in the absence of careful legislative deliberation."

United States v. Kimbell Foods, Inc. 440 U.S. 715, 739, and citing **Yazell,** The **Kimbell** court also ruled, **supra,** at 740:

> ". . . the prudent course is to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation." **supra,** at 740.

B. **Hisquierdo Applies Only to Railroad Retirement.**

This Court, in **Hisquierdo, supra,** found that Congress had specifically determined the manner in which Railroad Retirement would deal with the rights, if any, of divorced spouses of its

members. **Hisquierdo, supra,** at 584-5. Congress's enactment with respect to the relationship between Railroad Retirement and divorce, was the result of special labor-management negotiations, **id.** at 585. None of this unusual divorce-related specificity can be found in military retirement law.

Taking a nation-wide view of the equities between the **Hisquierdo** parties' in the light of the many current statutes mandating equitable division of marital property rights **supra,** at 9 we find the **Hisquierdo** decision would not be in conflict with the "equitable division" statutes not true with respect to the McCartys, were Dr. McCarty to be granted the relief he seeks. The Hisquierdos waived any claims that Angela's Social Security could be divided. Only she had Social Security entitlement. Jess had Railroad Retirement; it is in lieu of Social Security. While their dollar entitlements are unknown, facts recited indicate that between these particular individuals, equity may have been done. (Nothing noted herein is intended to derogate the legal position taken in **Hisquierdo** by some of the **amici** herein, since many Railroad ex-wives may have lost the only retirement benefits they would otherwise receive. Few may have had Angela's long employment history.) As this Court noted, in commenting on the equities in the Case before the Court (Art. III, U.S. Const.), "[she] wants the house" (439 U.S. at 588) - and under the facts she could get it only if Jess were charged with a lump sum in exchange for "her" share of the Railroad Retirement."

The contrast between the Hisquierdos and the McCartys dramatizes the inequities which could occur were Dr. McCarty to prevail herein; an inequity which would result in almost all military officer retirement cases. Military officer spouses, unlike Angela Hisquierdo, cannot normally accumulate an employment history; wives of enlisted men would also have more limited outside employment opportunities. See 23 infra. Angela, unlike

Patricia herein, has no "reliance damages". No nation-wide reliance on division of Railroad Retirements exists, unlike that in military retirements. Texas rejected divisibility of Railroad Retirement in **Berg v. Berg,** 115 S.W. 2d 1171 (Tex. Civ. App. 1938). The Texas Supreme Court, in **Eichelberger v. Eichelberger,** 582 S.W. 2d 395, reh. den. (May, July 1979) made clear the inapplicability of state law to Railroad Retirements following **Hisquierdo.** However, no Texas appellate court had ever specifically ordered a division of Railroad Retirement, though **Allen v. Allen,** 363 S.W. 2d 312, 314 (Tex. Civ. App. 1962) had indicated that only lack of 'vesting' prevented marital division. **Allen** is now overruled.

New Jersey's Supreme Court held that federal supremacy barred state treatment of both Social Security and Railroad Retirement, but that military retirement was divisible marital property, in **Hipsley v. Hipsley,** 390 A. 2d 1220. (1978)., prior to **Hisquierdo.** Counsels search has disclosed no state cases actually dividing Railroad Retirement pay.

Several state Supreme courts, other than California's, have capably analyzed **Hisquierdo's** inapplicability to military retired pay distribution in marital dissolutions then divided the military retirements. By way of example only, **Miller v. Miller,** 609 P. 2d 1185, 1187 (Mont. Sup. Crt 1980) with a careful analysis; **Czarnecki v. Czarnecki** 600 P. 2d 1098 (Ariz. Sup. Crt. 1979).

Finally, efforts by Husband to put Wife into the category of a commercial creditor, instead of that of a person who shared in the acquisition of the property - for that is the effect of arguments concerning "assignment", "garnishment" and the like, - represent a most unfair denigration of the efforts and services of the spouse during husband's military service.

C. The Wissner Cases Are Not Authority For Forfeiture of Income Rights Based on 18 1/2 Years Of Marital - Military Service.

Appellant attempts to build certain cases into an insur-

mountable barrier to the many states' division of military retired pay based on marital service: **Wisner v. Wissner,** 338 U.S. 655 (1950); **Free v. Bland,** 369 U.S. 663 (1962); **Yiatchos v. Yiatchos,** 376 U.S. 306 (1964); and **McCune v. Essig,** 199 U.S. 382 (1905). None relate to equitable treatment of marital property in divorce. Both **Wissner, supra,** and **Free v. Bland, supra,** support Mrs. McCarty's position herein, for they require a clear federal mandate before state family law schemes will be pre-empted; they also suggested the parties return to the state courts for application of state law, to determine any actual deprivation of marital property rights between husband and wife.

In **Wissner,** the contestants were the ex-wife and mother-beneficiary of the deceased Major Wissner in a battle over insurance proceeds, which became available as a result of Major Wissner's death. Major Wissner had paid the premiums for what was apparently term insurance, from earnings after his separation from Mrs. Wissner some years before his death. These premiums would now be his "separate property" under Cal. Civ. Code §5118, because paid by post-separation earnings, and in California now the 'widow' would have no claim. Additionally, **Wissner** reserved the issue as to wife's entitlement to the return to her of one-half the premiums paid from his earnings, thus giving state law priority as to all issues except the beneficiary designation specifically mandated by Congress during World World II. 338 U.S. 655, 660.

The life insurance proceeds, in any event, more nearly resemble personal injury damages than lifetime retired pay; and personal injury damages in California are subject to statutory exceptions from the equal division requirement. C.C. §4800.

In **Free v. Bland, supra,** this Court expressly gave priority to state law as between husbands and wives, by leaving to the contestant, the opportunity to litigate in the state court any issue as to whether the surviving husband may have defrauded his late wife of her property interest in the war bonds. **Yiatchos, supra,** also held that title designations on U.S. War Bonds may not be

used as an instrument whereby one spouse may defraud the other of property rights under state law, in another contest between a surviving spouse and an heir. **McCune v. Essig, supra,** supports state property law over federal homestead law, in a contest between a widow and surviving child.

D. **The Federal Government Has Subordinated Its Direct Interests To Avoid Conflict With State Marital Law Systems.**

United States v. Yazell, supra, is a clear example of subordination of direct federal interest (collection of money due it) to an archaic state law protection of the separate property of married women.

There have been similar state supportive decisions related to federal taxation, though the national interest requires money to run the government and pay for military defense. Thus, community property law whereby each spouse was deemed to have earned one-half the income, entitled the marital partners to "income-splitting', thus reducing federal tax income. State designation of such income was upheld by this Court in **Poe v. Seaborn,** 282 U.S. 101 (1930); even though the result was a lack of uniformity of federal taxation of married persons between the various states, - a problem which continued until joint tax return legislation was ultimately enacted in 1948.

In **C.I.R. V. Wilkerson,** 368 F. 2d 552, supra., where the taxable income in question was military retired pay, the court permitted the couple in a community property state to treat the income 50/50, for tax purposes though only one of the parties served in the military, bowing to state marital property definitions.

Where the highest court of a state has made a determination as to ownership of a property interest, that decision controls in the federal courts for federal tax purposes. CCH 1980, Community Property ¶325.01 **Commissioner v. Estate of Herman J. Bosch,** 387 U.S. 456, 11 L. Ed. 2d 886, 87 S. Ct. 1776 (1967).

Says the Internal Revenue's Service Publication 555 (1979) "Community Property and the Federal Income Tax:

> The law of the State in which you are domiciled governs whether you have community property or community income."

This together with **Wilkerson, supra,** shows that the federal courts regard the spouses as Co-owners of military retired pay. And section I-C of this brief shows the growing number of the states to say so specifically in many instances, impliedly in almost all others.

The federal government has made enactments intended to make effective state court division of federal Civil Service and Foreign Service retirement pay, 5 U.S.C.A. §8345 (j) (7) 1978 Pub. law 95-336; Exec. Order No. 12145 (July 18, 1979, 44F.R. 42653, under authority of 22 U.S.C.A. §1065.

The disproportionate volume of military retired pay litigation (compared to that concerning federal Civil Service retirements), the vehemence and persistence of those military retirees who continue to attack retired-pay-sharing in the face of repeated court decisions adverse to their position, and in the face of increased statutory preference for "equitable division" -indicate a possible reason why Congress has not yet acted to aid in effectuating state judgments dividing military retirements; conversely, Congress has remained aloof these many years from enactments contrary to the states' decisions.

See, e.g. **Milhan I** and **Milhan II, supra; Fithian I, supra,** and **Fithian II,** 74 C.A. 3d 397 (1977); **Ramsey v. Ramsey, supra,** where after the Idaho Supreme Court gave wife a share reduced to present value, Husband moved to California, discharged the judgment in bankruptcy court.

It should be noted, in dealing with federal-state comity in this field, that federal retirement income for its personnel are so

entwined, that in computing years of government service in Civil Service retirement, credit is given for Government, executive, judicial, and legislative, and including the military. 5 U.S.C.A. § 8332 (a) (b), 5 U.S.C.A. §2101 (1), 5 U.S.C. §8332 (c).

State community property laws are specially accommodated in the Bankruptcy Act, 11 U.S.C.A. §1 et seq; §101 (6); §726 (2) (A); §541 (2); §524.

The Employment Retirement Income Security Act, 29 U.S.C.A. §1132 ("ERISA") created substantial federal involvement in private pension plans, but state and federal courts alike have consistently rejected repeated efforts to eliminate the spouse's share - by claiming ERISA constituted a federal preemption, removing all private pensions covered by the Act from state marital courts. See. e. g. **Carpenter Pension Trust v. Kronschnabel** (C.D. Cal. 1978) 470 F. Supp. 978. The cases are too numerous and the issue too tangential for inclusion in this brief; but **Kronschnabel** is additionally helpful because it held that a marital distribution of a retirement income is not an "assignment".

The preamble to ERISA emphasized the public concern for the continued well-being of employees and their dependents who are directly affected by the pension plans covered. The continued well-being of military personnel and their spouses should be similarly secured from fear of loss of retirement income; "loss" and "fear" are the issues, whether the cause be funding, denial of vesting, or marital discord. In the military, fear of such loss could create the very discord which could lead to divorce; could create family disharmony, hindering successful service by the military serviceperson.

This Court spoke strongly to the issue of honoring state commercial and property law (priority of liens), when direct federal financial interests would be damaged, in **U.S. v. Kimbell Foods,** Inc., 440 U.S. 715 (1979), relying in part on the precedent of the **Yazell, supra,** a state family law preference case. Family law is even more peculiar to the states than commercial law, which, unlike family law, had status in the U.S.

Constitution itself. How much more forceful, then, is the case for priority of state interests when neither Constitution nor federal statutes have ever declared any federal law of marital property and marital dissolution.

ARGUMENT
IV

A RULING OVERTURNING THE MANY STATES' STATUTES AND CASES DIVIDING MILITARY RETIRED PAY IN MARITAL DISSOLUTIONS WOULD SEVERELY DISADVANTAGE, EVEN IMPOVERISH, THE GROWING NUMBER OF DIVORCED MILITARY WIVES. IT WOULD ALSO CONFLICT WITH THE PUBLIC POLICY OF INVOLVING WIVES IN THEIR HUSBANDS' MILITARY CAREERS.

Preliminary Note:

Because Dr. McCarty concentrated his "separate property" "husband take all" contentions at trial on the claim that the property was that of a non-California domiciliory (J.A. 45, Concl. of Law #7, Juris.Stmt. 34, 48, 52) there are no trial court findings of fact or conclusions of law concerning "federal preemption"; hence, no special evidence was introduced in the record concerning Patricia's reliance on sharing the retirement, her personal sacrifices, or her contributions to the military service life of the parties. Much can be inferred from the number of moves, number of children, rank of her husband, and the lack of accumulation of any income-producing assets in this almost-20-year marriage. **Amici** therefore ask the indulgence of the court in their presentation of material describing the roles of military wives generally, officers' wives particularly. In any event, the decision in this case will affect all former spouses of military personnel, and all persons who will become ex-military-spouses.

A. **The Military Wife Contributes to National Defense.** "... [E]very Air Force wife has three basic responsibilities: (1) to make a congenial home; (2) to rear a family of which he will be proud and (3) to strengthen her husband's morale..." "... most of us are familiar with the old saying that 'an officer's success depends on his ability, his conduct, and his wife.' "[10]

The Air Force issues a formal retirement certificate to an officer's wife:

> "On the occasion of the retirement of her husband from active duty with the United States Air Force has earned grateful appreciation for her own unselfish, faithful and devoted service. Her unfailing support and understanding helped to make possible her husband's lasting contribution to the Nation."[11] Air Force Form 1346, Nov. 1970.

B. **The Wife's Military-Related Duties are Substantial. The Military is Geared Toward the Wife as Part of Its Establishment.**

An officer's wife is required to carry out social, personal, and other requirements in connection with her husband's military position. If she does not, he can suffer a lower efficiency rating and his promotions and assignments can be adversely affected.[12] Her fulfillment of her supportive role is therefore often related to the ultimate rank on which the retirement income contested by Dr. McCarty is based.[13] An overview of the total immersion of an officer's wife into the military-service-world is set out in footnote #14.

The military involvement in family life is further indicated by the provision of family housing on most bases, (J.A. 32) money allowances for family quarters, financial and health service benefits for the whole family, (J.A. 36, 42); relocation allowances for family moves. 37 U.S.C. § § 406, 407. Extra financial allotment for the family is granted where the husband is assigned to a station where families cannot join him. 37 U.S.C. § 427.

C. The Divorced Wife, Particularly Where the Military Retirement Entitlement Period Has Been Reached (or Nearly Reached, as Here) is in a Particularly Adverse Economic Situation if her Share of the Retirement is Forfeited.

"[Most wives] who have spent their married years as a homemaker and mother may, despite [their] best efforts, find it impossible to re-enter the job market." **In re Marriage of Morrison,** 20 Cal.3d 437, 453, 573 P.2d 41, 52, 143 Cal.Rptr. 139, (1978), a 28-year marriage, much of it in the military, husband "retired" to a $1500 a month civilian job; whereas at age 54, the untrained Mrs. Morrison earned only $100 a month. See also **Kahn v. Shevin,** (1974) 416 U.S. 351, 354, as to the limited job market for older women.

While the military wife is primarily engaged in raising a family, handling the many moves, maintaining a home, the military man is often receiving training which will benefit him in civilian employment.

In the case at bench, appellant was a second year medical student (J.A. 32, App.Br.7) when they married; Patricia worked so Dr. McCarty could continue his medical studies. (J.A. 64, 41).

Dr. McCarty entered active Army duty during his fourth year of medical school (J.A. 32), advancing to a Board Certified Internist and Cardiologist. (J.A. 41). He was Chief of Cardiology at Letterman Hospital (J.A. 32) prior to his retirement. His earnings potential is dramatically different from Patricia's who faces years of training. She has not worked outside the home since 1958 (J.A. 41), needs six more years of training for her chosen field of psychology. (J.A. 41). The trial court recognized that Dr. McCarty's professional level was such that he could go into private practice and support himself without waiting for the military retirement to mature. (J.A. 60-61). He served out his twenty years and began receiving retired pay of $1,507.86 —

plus the usual non-cash benefits, such as health care available to retirees. (J.A. 36, 42)

The "training" given military officer's wives, is singularly irrelevant to the modern labor market. See, e.g., the instructions as to a wife's performance in connection with "Invitations and Acknowledgements", "Formal and Official Luncheons and Dinners", and the like activities in a guide for the "day in, day out life of most commissioned officers' families." **The Officer's Family Social Guide,** Gross, Beau Lac. Publ., L.C. No. 77-72724, 1977, pp.2, 13, et.seq.

The opportunities for military homemakers to obtain reasonable outside employment and training are necessarily limited. The average number of moves during an average of 19.8 years of military service was 11.4 times.[15] The McCarty's herein also moved frequently. (J.A. 32)

It should be noted, in the emphasis placed herein on "wives" that almost all ex-military spouses, especially of retirees, are likely to be women. This court found as fact in 1973 that 99% of all military personnel were then men. **Frontiero v. Richardson,** 411 U.S. 677, 681 (1973), see also **Personnel Administrator of Massachusetts v. Feeney,** 442 U.S. 256, 99 S.Ct. 2282, 2291 and fns. (1979).

Organizations are being established among former spouses of military personnel to assist them in coping with the problems they must specially confront as a result of divorce from a military person.[16]

It is obvious that civilian employment opportunities are poor for a person subject to frequent moves. Military couples have limited opportunmities to make investments, such as in real estate, to provide for after-retirement income for the non-military spouse. It would surely be no advantage to the military establishment if the wife (or both marital partners) had to concentrate on accumulating a source of alternative income for wife's later years; the spouses need to "pull together" to further the military member's career and the government pays for such restrictions on outside economic effort by providing the early and substantial retirement income.

The cases also indicate how often the only income-producing asset in military divorces is military retired pay. Examples: **Miller v. Miller,** 609 P.2d 1185 (Mont.1980); **Bradley v. Bradley,** 385 So.2d 101 (Fla.App. 1980); **Musser v. Musser,** 388 N.E.2d 1289 (Ill.App. 1979); **Light v Light,** 599 S.W.2d 476 (Ky.App. 1980); **Spencer v. Spencer,** 589 S.W.2d 174 (Tex.Civ.App. 1979); and in the case at bench. (J.A. 19, 20, 23, 24)

D. **Military Ex-Wives Affected by This Case are Particularly Likely to be Severely Disadvantaged. They Face Great Risk of Poverty Now and in Their Remaining Years.**

The divorced military wife, if she is fortunate enough to obtain paid employment, is faced with the low-level job classification and poverty pay levels which still afflict much of the female work force; hence the great need to share in the military retirement income. The statistics available concerning divorced women in the labor make it clear that a far greater percentage of them are (and presumably have to be) in the labor force, at whatever jobs they can get — than women who have husbands. U.S. Department of Labor, Bureau of Labor Statistics, **Perspectives on Working Women: A Data Book,** Bulletin 2080, October 1980.

Employed women are concentrated largely in the lower paying occupations. In 1973, more than two-fifths of all employed women were concentrated in ten occupations: secretary, retail salesworker, bookkeeper, worker in private household, elementary school teacher, waitress, typist, cashier, sewer and stitcher, and registered nurse. U.S. Department of Labor **Handbook on Women Workers,** 91-92 (1975). There is evidence that the occupational segregation is increasing. For example, in June 1978, 97% of all clerical workers were women, as compared with 62% in 1950. U.S. Department of Labor, Bureau of Labor Statistics, **Employment Perspective: Working Women** (Report No. 544, 1978). $59 per week to $170 per week was the range of 1977 weekly wages for these

job categories except teacher and nurse. U.S. Department of Labor, Bureau of Labor Statistics, **News: Trends in Hourly Earnings for Major Labor Force Groups,** Tables 1-3 (Nov. 2, 1977). The 1977 average weekly wage for male-dominated jobs not requiring higher education, such as transportation and public utilities was $275 and construction $297. U.S. Comm'n on Civil Rights, **Women Still in Poverty,** 19 (July 1979).

In 1979, more than one half of the employed divorced women were wmployed in the lower paid classifications. U.S. Department of Labor, Bureau of Labor Statistics, **Perspective on Working Women: A Data Book,** Bulletin 2080, October, 1980, p. 24 (Table 23).

In 1977, women clerical workers had a median income of $5,365 less than male clerical workers; female retail trade salesworkers earned $5,581 less than male retail trade salesworkers; and female food service workers earned $2,077 less than male food service workers. **Women in Poverty** at 19.

E. **"Alimony" is Not a Reasonable Substitute.**

In Texas, the court may not award any permanent spousal support or "alimony". Texas Family Code Ann. §3.65 (1975); Martindale-Hubbell, VIII, 1981, at 2518. Thousands of retired military live there; 57,000 from the Air Force alone. footnote 4 **supra.**

Texas, like California, has a multitude of published decisions dividing military retirements. The parties concerned have justifiably relied on property rights based on these decisions. See Section II.A of this brief. The Texas Code requires that the marital estate of the parties be divided "in a manner that the court deems just and right", taking into consideration the rights of the parties. See, **U.S. v. Stelter,** 567 S.W.2d 797, 798, reh.den. July, 1978.

If the military retirement is removed from the family property division, then many cases will have to be retried. Additionally, there will be the problem of the offset forbidden in **Hisquierdo,** 439 U.S. 572, 99 S.Ct. 802, 811-812 (1979); wherefore, Texas,

like other states, will have to rewrite its marital law entirely to accommodate any changes resulting from a reversal in the case at bench.

In "alimony" states, statistics indicate the inefficacy of such awards. Non-compliance with support is common, even regarding child support, where the legal "muscle" is far greater.[17] Support amounts, if paid, are often such that the families relying on "support" are at or below the poverty level.[18]

While Social Security will ultimately provide some for older divorced wives, who qualify for benefits based on their ex-husband's service,[19] these women must wait for the ex-husband to either reach age 62 or 65,[20] and make claim for the benefits; before the ex-wife can file for dependent ex-spouse benefits, she herself must reach age 62 to qualify.[21]

Since the average age of a former military wife was 51.7 years, according to one study,[22] the former military wife must often wait some 10 years for eligibility regardless of need.

If the divorced former military wife gains her own Social Security coverage through employment, her Social Security income will reflect the cumulative impact of past sex discrimination in jobs, pay and promotion, characteristic of all women, but she, in addition, will face the specially detrimental effects of late entry into the labor force, the likelihood of being forced into lower paying jobs, such as Mrs. **Morrison, supra.**

For all working women retiring on their own Social Security in November, 1980 the average benefit for women was $100 less than that for men — a high proportionate difference. [23]

F. Even "Veterans" Preference is Set Up To Deny Ex-Military Wives a Fair Opportunity in the Labor Market.

Ex-military wives competing for jobs in Massachusetts, for example, find that the absolute preference given there to Veterans "has a devastating impact on the employment opportunities for women." **Pers. Adm. of Mass. v Feeney, supra,** ("Feeney" hereafter) (and see fn. 7 at 2286 and sources cited describing the extent of veterans preferences throughout the

country). Unremarried widows of veterans may be eligible for preference — but not unremarried ex-spouses of deceased veterans, no matter what the length of marital service to the veteran. **Feeney, supra** fn. 10. The directly adverse impact on women is set out at 2291-2 and fns. Where women got public employee jobs, the positions were so low paying that male veterans had not applied at all. **Feeney** at 2291, and fn. 22.

It would be ironic if Patricia McCarty were to be deprived of her share of the retirement pay, acquire a profession, nevertheless, and then ultimately find herself thwarted in employment efforts by preference to a lower scoring veteran who is himself enjoying a retirement income which the job income would supplement.

For ex-military wives whose former husbands are not cardiologists reachable for support, the potential adversities on this issue alone, dramatically illustrate the cumulative unfairness. They also demonstrate yet another area of state statutory revision which an adverse decision herein would necessitate.

CONCLUSION

Reversal of the state courts' decision, and of the state law on which it is based, would result in manifest injustice to thousands of women. There is no clear basis in Congressional enactments or federal decisions on which to reverse this individual decision. There is no Congressional mandate to reverse the state policies overwhelmingly enunciated in the statutes and decisions. These are policies of justice and fairness; they are good law; they should stand.

Respectfully submitted,

by _____
Gertrude D. Chern, Santa Maria, Ca.
Judith Avner
Isabel Marcus
Soma F. Baldwin
Attorneys for Amici Curiae

FOOTNOTES:

1. The system of marital "acquests and gains", now called "Community Property" was brought to Spain by the Visigoths in the 7th Century; thence to the New World by Spain. It was the established marital property system of the California territory of Mexico, and continued after freedom was won from Spain. The existing property system was then guaranteed to the inhabitants of California and the Southwest under the Treaty of Friendship, Limits and Settlement with the Mexican Republic, Guadalupe Hidalgo, Feb. 2, 1848. California's original Constitution in 1849 (Art. XI, §14) expressly defined a wife's separate property and provided for further specificity of the common property system; husband's separate property rights were expressly set out in California's original statutes of 1850, and equal division of common property upon divorce was mandatory. Act of Apr. 17, 1850, Ch. 103 §12, Cal.Stat. 255. See 1 DeFuniak, **Principles of Community Property,** 1st Ed., 1943, 72-73, 106-113, 2, Ibid at 517; Prager, **The Persistence of Separate Property Concepts in California's Community Property System,** 1845-1975, 24 UCLA, 6-10, and sources cited therein.

California's Constitution was expressly accepted by Congress in the Act admitting California to the United States, Sept. 9, 1850, Pub.Law 453-2, 31st Cong.1st Sess., Acts of 31st Cong. 51-2.

2. Before current California domicile, 5 yrs. in Texas, 4 years in California, 2 yrs. in District of Columbia, 3 years in Hawaii, 1 in Pennsylvania. (Juris.Stmt. 54).

3. The Family Law Act, Stats. 1969, Ch. 1608, was the result of years of study and hearings, first by a "blue ribbon" commission, then by legislative committees; the work began in 1966 and was signed into law in 1969. Comparative analysis of the sections, before and after the Act, shows no substantive changes in definitions of "community property", "separate property" nor the definition or effect of "quasi-communtiy property". Attorneys Guide to Family Law Act Practice, Calif. Cont. Ed. of the Bar, Regents of the Univ. of Calif. LC 79-628503, p. 113; and tables therein.

4. The Texas cases are also numerous. Infra p. 11. Of Air Force retirees alone, California now has 61,000 and Texas 57,000. Yet the Air Force is the youngest of the services, hence probably has the fewest retirees, especially of older years. U.S. Air Force **News for Retired Personnel,** AFPR 30-16, Vol.22, No.5, Sept-Oct 1980, U.S. Govt. Printing Office, 1980, 677-136/1. The potential volume of incomeless ex-wives, could present a serious problem for state courts faced with new support actions, and a potential burden on all state services.

5. See "Divorce in the Fifty States". An Overview as of August 1, 1980, Free and Foster, Family Law Reporter, Bureau of National Affairs ("FLR"), Vol.6, No. 42; 6 FLR 4043 et. seq.; with useful tables of states; Table XII, A, B at 3061-3 gives a quick review of state division of retirement incomes generally. See also, Martindale-Hubbell, Law Directory, Vol. VIII, 1981 for summaries of the existing laws of the states, particularly as to each state, the sections on "Divorce" or "Dissolution of Marriage", "Husband and Wife".

6. Ch. 281, McKinney's Sessions Law of New York, 203d Session 7-9-80, Part B-5.

7. **Kirkham v. Kirkham,** 335 S.W.2d 393 (1960) (retired pay principal asset); **Miser v. Miser, 475 S.W.2d 597 (1971) (community property designation even though the military man had** to re-enlist after martial separation before vesting would occur; **Browder v. Browder, 573 S.W.2d 878, hrg.den. (1978), (distributing previously "missed" retirement pay); similar result in Cruse v. Cruse,** 572 S.W.2d 68, (Oct. 1978). **Spencer v. Spencer,** 589 S.W.2d 174 (Oct. 1979), (presents unusual facts, the couple having been once divorced, remarried, litigated effect of remarriage) **Spencer's** facts also illustrate dramatic differences in the economic positions of the spouses: Husband had military retirement income of $673 a month at the time of second divorce; had almost 20 additional years of federal civil service, at $15,000 a year earnings and will get additional civil service retirement pay. Wife earns $625 per month and loses her military medical benefits. 589 S.W.2d 175-6. See also, the annotation in 94 A.L.R.3d 176, et.seq. and Texas cases **passim.**

8. Indiana: **Lubunao v. Lubunao,** 388 N.E.2d 574 (Ind. App. 1978) (Keogh); Oregon: **Rogers v. Rogers,** 45 Ore.App. 885, 609 P.2d 877, 879 (1980) (foreign service — almost 100% abroad); Wisconsin: **Shafer v. Shafer,** 3 Wisc.2d 166, 87 N.W.2d 803 (1958) (Post office).

9 Delaware: **P.V.P.,** Case No. 2308-77) 7/19/78; at 6 FLR 4062; Hawaii: **Tavares v. Tavares,** 574 P.2d 125, 127 (1978) (reopen for inquiry re vesting); Kentucky: **Foster v. Foster,** 589 S.W.2d 223, 224 (Ky.App. 1979); Minnesota: **Elliott v. Elliott, supra;** Tennessee: New Mexico held in **Stephens v. Stephens,** 93 N.M. 1, 595 P.2d 1196 (1979) that the law of Tennessee as well as of New Mexico required division of military retirement in divorce cases.

10. M.P. Gross, **The Officer's Family Social Guide,** Beau Lac Pub. 1977, Library of Congress Catalog Card No. 77-72724; Testimony before the House Armed Services Subcommittee on Military Compensation by Rep. Patricia Schroeder May 28, 1980, p.2, citing Nancy Shea **The Air Force Wife,** New York, Harper and Bros. 1951, n.p.

11. See Appendix "A".

12. Jean Reid, "Divorced Air Force Wives Want Benefits for Dedication of Work" **Valley Times** (North Las Vegas, Nevada), November 12, 1980, p.l.

13. Reid, **op.cit.;** See also, Bruce Callander "Commentary", **Air Force Times,** July 7, 1980, n.p.: "Many (military) wives contribute directly to the success of their husbands by encouraging them by wise counseling, by entertaining their associates, by maintaining tranquility in the home and being supportive in other ways."

14. "A company grade officer's family must be able to meld successfully into an already established way of life . . . When they arrive at a base or post, the other members of the command will extend to them all of the courtesies and priviliges that are given to military families . . . The chief of security will be as interested in their security as that of the senior family . . . the engineers will be as interested in the maintenance of their quarters . . . the commander as

interested in their well-being. A wise couple will show their appreciation and reciprocate by making a real effort to cooperate and be a part of the community . . . It will certainly be more advantageous [to the officer returning to civilian life] if his record reflects a couple who were sincere in their efforts, who could meet and enjoy new people, who were able to adapt to new and different circumstances, and who displayed an attitude of cooperation and respect . . . Many think that the field grade officer [colonel] and his wife are the most vital link in the military life chain." Gross, **The Officer's Family Social Guide,** supra, p. 3; "Family Life Vital to Military Readiness", **Air Force Times,** p.1, Nov. 10, 1980; describing conferences on issue and study by Dr. Dennis K. Orthner, "Families in Blue: A Study of Family Life in the Air Force".

15. Testimony before Armed Service, etc. by Action for Former Military Wives, n.9.

16. These national organizations include Action for Former Military Wives, Ex-Partners of Servicemen for Equality, Alliance for Unknown Women Veterans, Medical Equality for Dependents. Diane Reischel, "Former Military Wives want their Cut of the Retirement Pay" Fort Worth **Star-Telegram,** Fort Worth, Texas, August 11, 1980, Living Section C; Nancy Senalle, "Military Wives (We also served)" **Virginia Weekly,** December 4, 1980, reprint from **Washington Post,** no date.

17. U.S. Dept. of Commerce, Bureau of Census, Current Population Study, Child Support & Alimony, p. 23, No. 107, Sept. 1980. Cassetty, Child Support and Public Policy, Lexington Books, Lexington, Mass.

18. Chambers, David: Making Fathers Pay; The Enforcement of Child Support: Chicago; University of Chicago Press, 1979, note, especially, pp. 48-49.

19. 42 USCA §410(a), (m) and 20 CFR §404.1013(f).

20. 42 USCA §413(a)(1) and 20 CFR §404.102.

21. **Matthews v. DeCastro,** 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). The Court held that the statutory classification of §202(b)(1) of the Social Security Act whereby a married woman under 62 whose husband retires is granted monthly benefits if she has a minor or dependent child in her care, but a divorced woman under 62 whose ex-husband retires does not receive such benefits (until she reaches 62) does not violate the Due Process Clause of the Fifth Amendment.

22. **Ibid,** fn. 19.

23. Report, Social Security and the Changing Role of Men and Women, HEW, p.10, 2-29; see Department of Labor, Bureau of Labor Statistics 2B, Employment and Earnings 28 #6, June, 1978; See also President's Commission on Pension Policy: Working Women, Marriage and Retirement, Working Papers, August 1980, pp.29-49.

APPENDIX "A"

CERTIFICATE OF APPRECIATION

FROM THE UNITED STATES AIR FORCE

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING:

THIS IS TO CERTIFY THAT

MRS JAMES K. POTTS

on the occasion of the retirement of her husband from active duty with the

UNITED STATES AIR FORCE

has earned grateful appreciation for her own unselfish, faithful and devoted service. Her unfailing support and understanding helped to make possible her husband's lasting contribution to the Nation

ON THE 1ST DAY OF JANUARY
ONE THOUSAND NINE HUNDRED AND SEVENTY SEVEN

George H. Sylvester

GEORGE H. SYLVESTER
Lieutenant General, USAF
Commander, Aeronautical Systems Div.

David C. Jones

CHIEF OF STAFF

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On January 3, 1981, I served the within Motion and Brief of the Amicus Curiae on the interested parties in said action, by placing a true copy in each of five (5) sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Mattaniah Eytan
Kirkwood, Kaplan, Russin & Vecci
332 Pine St., Suite 400
San Francisco, CA 94104
(For appellant husband)

Herbert N. Harmon, Atty.
Harmon, Wilmot & Spaulding
910 17th St., N.W. Ste. 612
Washington, D.C. 20006
(For amicus men's military groups)

Walter T. Winter, Esq.
100 Bush St., 20th Floor
San Francisco, CA 94101
(for appellee)

Clerk Court of Appeal
1st Appellate District
4154 State Bldg.
Civic Center
San Francisco, CA 94101

Clerk of Superior Court
County of San Francisco
480 City Hall
San Francisco, CA 94102

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 3, 1981, at Santa Ana, Califoirnia.

Jack Gallagher